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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 714

JAMES J. DONOHUE,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SYDNEY M. EISENBERG
EDWIN A. STAR
1131 West State Street
Milwaukee, Wisconsin 53203
Attorneys for Petitioner

HAMMERSMITH-KORTMEYER CO.
MILWAUKEE

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To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

James J. Donohue, Petitioner herein, prays that a Writ of Certiorari be issued to review the order and decision of the Circuit Court of Appeals for the Seventh Circuit affirming the decree and decision of the Tax Court of the United States, the Court of Appeals' decision being dated October 1, 1963, said case involving an alleged $3282.54 deficiency for the year 1954, assessed by the respondent appellee against money that was embezzled from taxpayer and which he never saw or received and was never entered in his books and of which he never had custody or control.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit in this case has not yet been published, but it is copied in Appendix (post P. 10).

JURISDICTION TO REVIEW

Jurisdiction of this court is invoked under Section 1254, Title 28, U.S.C.A., Judiciary and Judicial Procedure, subsection (1) and Section 2101(C).

QUESTIONS PRESENTED FOR REVIEW

1. Whether due process and equal protection of the law has been denied petitioner under the United States Constitution, by Articles V and XIV of the Amendments and Article I, Section 9 of the Wisconsin Constitution; in that the formula of the government was without rational foundation or a sound mathematical basis and, therefore, excessive and conjectural and is a tax assessment on money never received by taxpayer!

2. Whether the decision of the United States Court of Appeals is subject to reversible error, if the records on which the Court of Appeals based its decision were not supported by the sworn testimony of not only the government witnesses, but denied by the taxpayer.

3. Whether the Supreme Court of the United States will grant Certiorari to review a decision involving a federal question of substance not heretofore determined by the Supreme Court, and affecting every citizen of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES OR REGULATIONS INVOLVED

Articles V and XIV—Amendments to the United States Constitution provide:

> "No person shall be deprived of life, liberty, *or property* without due process of law." (Italics ours)

Wisconsin Constitution Article I, Remedy for Wrongs, Section 9:

> "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." (Italics ours)

Section 446 of the Internal Revenue Code (Title 26 U.S.C.A. Sec. 446) provides:

> "* * * the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegate, *does clearly reflect income.*" (Italics ours)

STATEMENT OF THE CASE

The petitioner-appellant was the owner of the Town House, a Port Washington, Wisconsin, hotel, tavern, and liquor store combination, on the main street in the small town north of Milwaukee, on Lake Michigan. The case involves 1954 tax assessment of $3,282.84 as a deficiency. The government used their agents' mark-up method. The agents' reports showed an actual mark-up of 74%, but the government claims the appellant understated his gross receipts in the amount of $8,392.23 for 1954. The government also failed to give consideration to the em-

bezzler who admitted embezzling monies, and the petitioner-appellant testified that Mr. Bittner, the admitted embezzler, took $80.00 to $100.00 weekly of embezzled monies from petitioner-appellant in 1954.

All of the relevant figures in this case are part of the record.

It was found that the return figures in the Federal income tax return were taken from a complete set of books verified by bills and statements kept in the usual course of business reflecting all the receipts and disbursements in exquisite detail under the exclusive control of Mr. Bittner who was an accountant recording the transactions and operation of the business owned by Mr. Donohue. Mr. Bittner embezzled $80.00 to $100.00 weekly and this should be charged up as an income to the party that took it. The amount of $7800 was admittedly embezzled.

The respondent contends that the formula and mark-up as shown in respondent's 90-day letter is true and correct according to the facts and circumstances of the Town House operation in Port Washington, Wisconsin.

The petitioner has shown by the books and records of the Town House received into evidence all actual deposits and receipts involving Donohue.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioner's tax return was filed for the year in question with the Collector of Internal Revenue for the Eastern District of Wisconsin, being within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, and the original petition for review filed pursuant to the provisions of Sections 7482 and 7483 of the

Internal Revenue Code of 1954. Further basis for jurisdiction of this court is Section 1254, Title 28, U.S.C.A. Judiciary and Judicial Procedure, subsection (1). No issue exists on jurisdiction.

ARGUMENT TO SUPPORT ALLOWANCE OF THE WRIT

The fundamental precepts of the Federal Constitution of the United States and all laws and regulations passed in conformity therewith, protect fully all peoples, regardless of race, color or creed, to preserve to them their basic rights so that no arm of the government can deny due process and equal protection of the laws to all.

The attempt of the government to use a faulty basic formula or procedure here, attempts to take petitioner's property without just cause, arbitrarily and capriciously and contrary to the guarantees of the United States Constitution!

The power given to the Supreme Court to review cases in which the decision of the Court of Appeals is made final,

> " * * * was intended to vest in this court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that court, and irrespective of any ruling or determination therein. * * * While this power is coextensive with all possible necessities and sufficient to secure to this court a final order over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, *and only when the circumstances of the case satisfy us that the importance of the question involved*, the necessity of avoiding conflict between two or more court of appeals, or between courts of appeal and the courts of

a state, *or some matter affecting the interests of this nation in its internal* or external relations, *demands such exercise.*" (Italics ours)

Forsyth v. Hammond, Ind. 1897, 17 S. Ct. 665, U.S. 506, 41 L. Ed. 1095.

The Supreme Court would grant certiorari to review a decision involving a federal question of substance not theretofore determined by the Supreme Court. (Italics ours). *Brooklyn Sav. Bank v. O'Neil*, N.Y. 1945, 65 S. Ct. 895, 324 U.S. 697, 89 L. Ed. 1296, rehearing denied 65 S. Ct. 1189, 325 U.S. 893, 89 L. Ed. 2005.

Review in appellate proceeding extends to findings of fact as well as to rulings on questions of law. *Panama Mail S.S. Co. v. Vargos*, Cal. 1930, 50 S. Ct. 448, 281 U.S. 670, 74 L. Ed. 1105.

Rule 19 of the Rules of the Supreme Court of the United States contains an outline of the reasons which the Supreme Court of the United States will consider in granting a review on Writ of Certiorari. Such review is not a matter of right, but is one of sound judicial discretion. One category of cases which will be reviewed by certiorari are those cases in which a United States Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by the Supreme Court of the United States.

Certainly this Honorable Court will not permit a *blind application of a prior ruling with disregard to the applicable fact situation!* This must be especially true when it appears so obvious that *justice has miscarried!*

Under no logical or proper legal interpretation should a citizen be *taxed for money which he never received or had any custody or any control of!* If the Commissioner

of Internal Revenue is applying such rule in determining the tax liability of our citizenry it is high time for an immediate change!

Simply expressed, if A sells to B an item and gives the item to C for delivery to B and C receives $10,000 from B which C is supposed to bring back to A but, instead, admittedly spends it in Las Vegas, is the $10,000 *"income" to A which the Commissioner of Internal Revenue can assess a tax on and compel A to pay such tax?* The position taken by the respondent lacks the requisite "horse sense" to be worthy of perpetuation. It appears obvious that respondent's conclusion was based on false premises and thus does not meet the test of validity which a true syllogism demands.

Your petitioner has exhausted all available remedies and is now confronted with an unjust demand for payment of a tax on monies never received. Undoubtedly this situation has been duplicated many times over in this country. It is an intolerable situation and ought to be corrected. This Honorable Court holds the power to make the correction and should do so.

CONCLUSION

In conclusion, to the end that justice does not miscarry and to the further end that our citizenry not be compelled to carry the burden of an unjust and oppressive tax —illogical on its face and assessed with disregard to the fundamental concept of fairness, it is respectfully prayed by Petitioner that a Writ of Certiorari be directed herein to the United States Court of Appeals for the Seventh Circuit and that in due course the issues involved be ruled

upon by this Honorable Court to establish a valid precedence in conformity with our established concepts of jurisprudence.

Respectfully submitted,

SYDNEY M. EISENBERG
EDWIN A. STAR
Attorneys for Petitioner

P. O. Address
1131 W. State Street
Milwaukee, Wisconsin 53203

CERTIFICATE

As one of the attorneys for James J. Donohue, petitioner above named, I do hereby certify that a printed copy of the foregoing, together with the appendix, have been served on the Honorable G. G. Withey, Judge of the Tax Court of the United States, on Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, and three copies have been served on Louis F. Oberdorfer, Assistant Attorney General, Respondents attorneys, and on Solicitor General, Department of Justice, Washington 25, D.C. by placing 3 copies of same in the United States mail, directed to each of them at their respective offices, postage prepaid.

Dated, Milwaukee, Wisconsin, this 27th day of December, 1963.

Edwin A. Star
Attorney for Petitioner.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14150 September Term, 1963
September Session, 1963

JAMES J. DONOHUE,
Petitioner-Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the Tax Court of the United States.

October 1, 1963

Before DUFFY, CASTLE and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is an appeal by taxpayer[1] from a judgment of the Tax Court confirming Commissioner's determination of a deficiency in taxpayer's income tax for the year 1954.

Because the records of taxpayer's tavern business did not "clearly reflect income," Commissioner used a mark-

[1] "Taxpayer," as used in this opinion, refers to James J. Donohue and Helen Donohue who filed a joint return in 1954.

up method in determining a deficiency for 1954.[2] It is undisputed that taxpayer's 1954 income tax return did not include as gross income the $8,392.23 embezzled from taxpayer's tavern business in that year by John Bittner, his accountant who had been given complete control over the financial matters of the business, and that the embezzlement was not discovered by taxpayer until 1958.

The decisive issue is whether the embezzled money was taxable to taxpayer in 1954, as the Tax Court found, even though he did not then know of the embezzlement by his accountant.

Taxpayer relies upon *James v. United States*, 366 U.S. 213 (1961), to support his argument that Bittner, and not the taxpayer, should be taxed upon the embezzled funds. The *James* case is authority for taxpayer's argument that the embezzled money was taxable to Bittner, but not authority for the conclusion that therefore the Tax Court's judgment against taxpayer must fall.

Taxpayer also relies upon *Alsop v. Commissioner of Internal Revenue*, 290 F. 2d 726 (2d Cir. 1960). In *Alsop* the embezzled funds were never credited to the taxpayer's account, nor used for taxpayer's benefit. Here the bartender received the money, deposited it in taxpayer's cash register, and used it in taxpayer's business before the embezzlement. Taxpayer was given a definite economic benefit from the receipt of the money prior to its embezzlement. Also, the taxpayer in *Alsop* reported the embezzlements as losses for the years in which they were discovered, but had never reported as income the amounts embezzled. Here the issue is simply whether the moneys embezzled were income to the taxpayer in the year of receipt. These considerations distinguish *Alsop*.

---

[2] Pursuant to §446 of the 1954 Internal Revenue Code.

We hold that the Tax Court did not err in deciding that the moneys embezzled by Bittner in 1954 were income to the taxpayer in that year.[3]

The Tax Court found that the amount of additional and unreported gross income from the tavern business was "at least" $8,392.23, the deficiency assessed by the Commissioner. This finding is unchallenged. The finding was made by comparing that amount calculated by the Commissioner under the mark-up method with the sum of $7,800.00, admittedly embezzled, plus other amounts "unlawfully charged" by Bittner to the taxpayer. We think this rough approximation of the extent of Bittner's defalcation is sufficient to establish the additional income for 1954. *Tehan v. Commissioner of Internal Revenue*, 295 F. 2d 895 (7th Cir. 1961). In this court the respondent conceded that the fund embezzled should be reduced by the $750.00 received by taxpayer from Bittner in 1958. The deficiency is therefore reduced by that amount and the Tax Court's decision as modified is affirmed.

The Tax Court's judgment is AFFIRMED as reduced.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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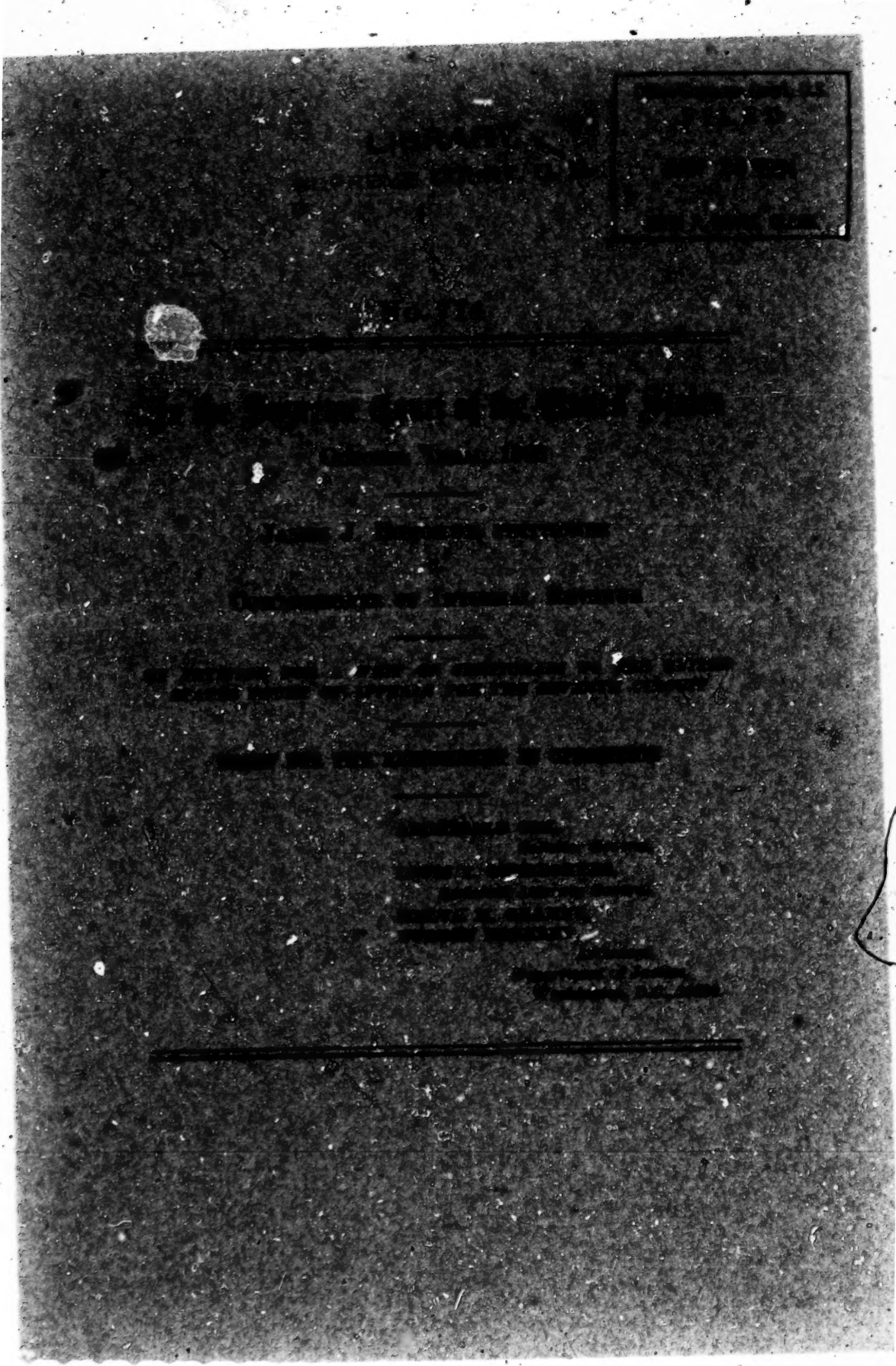
[3] See *Soweli v. Commissioner of Internal Revenue*, 302 F. 2d 177 (5th Cir. 1962).



In the Supreme Court of the United States

OCTOBER TERM, 1963

NO. 714

JAMES J. DONOHUE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 10–12) is reported at 323 F. 2d 651.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1963. (Pet. 10–12.) The petition for a writ of certiorari was filed on December 28, 1963. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether cash receipts for goods sold are excludable from gross income because they were embezzled by the taxpayer's accountant subsequent to their receipt.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 165. LOSSES.

* * * * *

(e) *Theft Losses.*—For purposes of subsection (a), any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss.

* * * * *

STATEMENT

In 1954 the taxpayer owned a combination hotel, tavern and liquor store known as the Towne House in Port Washington, Wisconsin. (R. 42.)[1] For that year the Commissioner determined that the taxpayer had omitted taxable income from his income tax return in the amount of $8,392.23, an amount which he determined by the percentage markup method (R. 43), and determined a deficiency of $3,282.54 in the taxpayer's income tax (R. 42).

In his pleadings in the Tax Court, taxpayer alleged that during 1954 his accountant embezzled an average of $100 to $150 per week from Towne House receipts. (R. 42–43.) His testimony showed that the accountant embezzled other money by way of charging personal expenses to the business and, although the amount of these additional embezzlements was not disclosed to the Tax Court, that at least $700 of it was reimbursed in the year in which taxpayer dis-

[1] "R." references are to the appendix to the taxpayer's brief in the court of appeals.

covered the embezzlements. (R. 43.) None of the embezzlements was discovered until a year subsequent to 1954. (R. 43.)

The Tax Court found as a fact that the taxpayer had additional unreported income for 1954 in the amount of at least $8,392.23. (R. 43.) In view of the taxpayer's admissions, the Tax Court found it unnecessary to discuss or rule upon the Commissioner's use of the percentage markup method, except to comment that the taxpayer's admissions indicated that the result reached by that method "was remarkably apt and accurate". (R. 43, 44.)

The court of appeals affirmed the Tax Court's holding that the taxpayer's admissions substantially corroborated the tax deficiency. (Pet. 12.) In rejecting the taxpayer's claim that this income was not taxable to him, the court pointed out that the income in issue was received by the taxpayer's bartender, placed in the taxpayer's cash receipts and used in the taxpayer's business; that the taxpayer received a definite economic benefit from this money before his accountant embezzled it; and that it therefore constituted taxable income to him. (Pet. 11.)[2]

ARGUMENT

1. The decision below is correct. While the taxpayer argues (Pet. 5–7) that he never received the income in issue, it is undisputed that the embezzled

[2] The court of appeals reduced the amount of additional income by the $750 which was reimbursed in 1958 stating that the government had conceded that this was proper. We were not aware of any such concession, and the adjustment seems plainly wrong, but the matter is of no moment here.

receipts were initially received by his manager-bartender, George Krellin, and that Krellin placed the money in the taxpayer's cash register, where it was used in the business until the embezzling accountant collected it every Monday morning. (R. 33, 36.) This receipt by the agent, Krellin, constituted receipt by the taxpayer. *Maryland Casualty Co.* v. *United States*, 251 U.S. 342. The subsequent embezzlement has no effect on the taxability of this income to the taxpayer in 1954, when it was received; the embezzlement merely provides the basis for a theft loss deduction in the year in which the embezzlement was discovered, which was in 1958 (Pet. 11; R. 34). Section 165(e), Internal Revenue Code of 1954, *supra*.[3]

2. The hypothetical example posed by the taxpayer (Pet. 7) is inapposite. It assumes, contrary to fact, that the agent who received the money is the embezzler, the situation involved in *Alsop* v. *Commissioner*, 290 F. 2d 726 (C.A. 2d). The court below distinguished *Alsop* on factual grounds (Pet. 11), and properly so.

3. Contrary to the taxpayer's assertions (Pet. 5–6), this case presents no important question of federal law requiring a decision by this Court. Indeed, the question which the taxpayer asks the Court to review is one which was not passed upon by either court below, i.e., the Commissioner's use of the percentage markup method.[4]

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[3] See H. Rep. No. 1337, 83d Cong., 2d Sess., p. 24; Treasury Regulations on Income Tax (1954 Code), Section 1.165–8(d).

[4] The Commissioner's use of this method pursuant to Section 446 of the Internal Revenue Code of 1954 has been repeatedly approved. See, e.g., *Western Supply and Furnace Co.* v. *Com-*

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
MELVA M. GRANEY,
BURTON BERKLEY,
Attorneys.

JANUARY 1964.

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missioner, 295 F. 2d 341 (C.A. 7th); *Bernstein* v. *Commissioner*, 267 F. 2d 879 (C.A. 5th); *Kanwick* v. *Commissioner*, 232 F. 2d 678 (C.A. 6th).

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